Supreme Court, U.S.
FILED
No. 051666 JUN 26 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERRY EUGENE PENNY,
AKA TERRY PENNY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition from the Denial of a Writ of Certiorari to the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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June, 2006

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth, Sixth and Fourteenth Amendments to the United States Constitution mandate a new rule of law tolling, waiving or suspending the statute of limitations for post conviction proceedings as contained in T.C.A. § 40-30-102 due to the inconsistencies in the record, the unsigned judgment and the severe Boykin violations?

2. Whether Terry Penny is "in custody" for a Writ of Habeas Corpus under his 1976 conviction because such conviction is now an element of a new charged offense of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)?

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CITATIONS OF THE OFFICIAL AND UNOFFICAL OPINIONS AND ORDERS ENTERED IN THIS CASE BY THE TENNESSEE COURTS

1. Penny v. State of Tennessee, 2005 WL 3262929 (Tenn.Crim.App., December 2, 2005) (NO. E2004-01735-CCA-R3PC) (Opinion, Apx at C1-C23), *cert. denied* March 27, 2006. (Order, Apx at A1);

2. Penny v. State of Tennessee, Hamilton County Criminal Court Docket No. 130199 (Final Order denying Motion to Correct Judgment, Petition for Post-Conviction and Writ of Habeas Corpus entered July 8, 2004, Apx at E1-E10);

3. State of Tennessee v. Penny, Hamilton County Criminal Court Docket No. 130199 (Final Judgment entered June 28, 1976, Apx at I18-I21).

BASIS FOR JURISDICTION

The Petitioner is seeking review of a final Tennessee State Court Judgment. This Court has jurisdiction pursuant to Sup. Ct. R. 10(b) & (c) and 28 U.S.C. § 1957 following the Tennessee Court of Appeals' decision in Penny v. State of Tennessee, 2005 WL 3262929 (Tenn.Crim.App., December 2, 2005) (NO. E2004-01735-CCA-R3PC) (Opinion, Apx at C1-C23) and subsequent denial for permission for Writ of Certiorari by the Tennessee Supreme Court on March 27, 2006. (Order, Apx at A1). The Petitioner did not file a Petition for Rehearing.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED IN THIS CASE

1. U.S. Const. amend. V, § 1:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. amend. VI, § 1:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. T.C.A. § 29-21-101:

> Any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint.

5. T.C.A. § 40-30-102:

> (a) Except as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be

barred. The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

(b) No court shall have jurisdiction to consider a petition filed after such time unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

(c) This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in § 40-30-117.

STATEMENT OF THE CASE

On April 1, 1975, the Petitioner, Terry Penny, was indicted in the Hamilton County Criminal Court for feloniously selling a controlled substance. (Indictment, Apx at I15-I17).

On May 19, 1976, Terry Penny appeared in Hamilton County Criminal Court before the Honorable Judge Campbell Carden. (Courtroom Minutes dated 5/19/76, Apx at I22-I24). The Petitioner pled guilty and the Court continued the case until June 28, 1976 for the Petitioner to file a Petition for Probation. The courtroom minutes from May 19, 1976 state that the Petitioner pled guilt to "selling a controlled substance" and that he received a sentence of eleven (11) months, twenty-nine (29) days. (Courtroom Minutes from 5/19/76, Apx at I22-I24).

On June 28, 1976, the Petitioner appeared back in Court. The courtroom minutes reflect that the Petitioner

had timely filed his Petition for Probation and that his Petition was sustained and placed a further condition upon the Petitioner of good behavior for a period of five years. (Courtroom minutes dated 6/28/76, Apx at I25-I30).

The Judgment is dated June 28, 1976 but was never signed by Judge Carden. (Judgment, Apx at I18-I21). The Judgment reflects that the Petitioner pled guilty to "Attempt to Commit a Felony" not "selling a controlled substance" as listed in the courtroom minutes. (Judgment, Apx at I18-I21). "Attempt to Commit a Felony" is a separate and distinct offense and under Tennessee's felony classification system prior to 1981 has a different impact on the Petitioner's civil liberties.

To further add to the inconsistencies in the record, the Petitioner file a verified Petition for Probation on June 16, 1976. (Petition for Probation, Apx at I31-I34). The Petition for Probation was sustained by the trial court according to the courtroom minutes. (Courtroom minutes

dated 6/28/76, Apx at I25-I30). The Petition for Probation reflects that the Petitioner pled guilty to "simple possession of marijuana" and received a sentence of eleven (11) month, twenty-nine (29) days. (Petition for Probation, Apx at I31-I34). This is the only record in the entire file that shows Terry Penny was put under oath by its verification. Id. This Petition was signed by Mr. Penny's attorney and reflects service upon the Hamilton County District Attorney's office. Id. It contained a verification signed by Terry Penny that the allegations, "contained in the foregoing petition are true." Id. The verification was sworn to and subscribed by a Notary Public. Id. Most importantly, the Petition for Probation corroborates the courtroom minutes in that both documents reflect that the Petitioner received a sentence of eleven (11) months, twenty nine (29) days. Id; (Courtroom minutes dated 6/28/76, Apx at I25-I30).

Therefore, the unsigned judgment, the courtroom minutes and the Petition for Probation all reflect that the Petitioner pled guilty to a separate criminal offense.

This Court can take judicial notice that the standard demarcation line in common criminal law jurisprudence between a misdemeanor and a felony is the difference between an eleven (11) months, twenty-nine (29) day sentence and a sentence exceeding one year.

The Official Court Reporter for Hamilton County Criminal Court, Division One, reviewed the official audiotapes from May 19, 1976 and June 28, 1976, the purported days Mr. Penny appeared in court. (Affidavit of Abigail Pearce, Apx at I35). There were recordings on both dates but of other criminal defendants. The Court Reporter listened to them and there was nothing in those recordings to suggest that the trial court talked to, acknowledged or ever conducted any type of *voir dire* or colloquy with Terry Penny. The audio tapes are direct proof

that the trial court did not conduct the necessary Boykin *voir dire* to ensure a knowing, voluntary and intelligent plea of guilty.

In addition, the unsigned judgment reflects that Mr. Penney was sentenced to good behavior for five years under parole supervision by the State of Tennessee. The State Board of Probation and Parole has no records after searching under Terry Penny's name, birth date, and social security number that he was ever under any supervision for the five year period in docket number, 130199. (State of Tennessee's Board of Probation and Parole letter dated June 3, 2004, Apx at F3-F4).

The date of Mr. Penny's judgment was approximately one year prior to the Tennessee Supreme Court's landmark decision in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977) adopting the procedural protections outlined by this Court in Boykin v. Alabama, 395 U.S. 238 (1969). The Mackey Court held that the sentencing

procedures in Hamilton County Criminal Courts, only one year after Terry Penny's plea, failed to ensure knowing, voluntary and intelligent pleas of guilty.

In January, 2004, nearly 28 years later, the Petitioner became the subject of a multi-count federal indictment. The government discovered several firearms in the Petitioner's residence on two separate occasions in August, 2003 and January, 2004 and has charged Terry Penny with violating 18 U.S.C. § 922(g), that is being a felon in possession of a firearm. The government is relying upon this 1976 conviction as the predicate felony offense for the violation of 18 U.S.C. § 922(g). This is Terry Penny's only conviction that could possibly be construed as being a felony. (State's Response to Petitioner's Motion to Correct Judgment, Apx at G1-G5).

On March 30, 2004, within three months of his federal indictment, Mr. Penny filed a Motion to Correct

Judgment in the Criminal Court of Hamilton County, Tennessee. (Motion to Correct Judgment, Apx at K1-K4)

The Petitioner also filed a week later, on April 6, 2004, a Petition for Post-Conviction Relief asserting various constitutional deficiencies and violations that are presently before this Court. (Petition for Post Conviction Relief, Joint Appendix, Apx I1-I35).

The Honorable Judge Douglas Meyer, Division I, Hamilton County Criminal Court, conducted a hearing on June 7, 2004 on the Petitioner's Motion to Correct Judgment and Petition for Post Conviction. Judge Meyer issued an Order dated July 8, 2004 denying the Petitioner's Motion to Correct Judgment and finding that the Petitioner's claims under the Post Conviction Act were barred by the statute of limitations contained in T.C.A. § 40-30-102. (Order dated July 8, 2004, Apx at E1-E10). The trial court also interpreted Mr. Penny's claims as seeking habeas corpus relief and denied them as well. Id.

In the Final Order, the trial court agreed that the record "contained one or more clerical errors..." (Order dated July 8, 2004, Apx at E3-E4). The trial court noted that the Judgment and the Courtroom minutes are in disagreement. (Order dated July 8, 2004, Apx at E3-E4). In denying the Petitioner's Motion to Correct Judgment, the Court stated "although it is clear that the record contains one or more clerical errors, considering the internal consistency of the Judgment and the lack of such consistency of other documents in the record as well as the absence of the transcript and therefore the absence of inconsistency between the Judgment and the transcript, the Court finds that the Judgment is not the location of the error(s)." (Order dated July 8, 2004, Apx at E5).

As to the Petitioner's Petition for Post Conviction, the trial court noted that the Due Process clause precludes any type of strict applications to "procedural requirements such as statutes of limitation that would affectively deny a

litigant an opportunity to present his claims at a meaningful time and a meaningful manner." (Order dated July 8, 2004, Apx at E6). However, the Court denied the Petitioner's claims as time barred and reasoned:

> The only explanation that the defendant offers for his failure to present his post-conviction claims in a timely petition is that he did not have any reason to know that the conviction offense was a felony until his indictment by a federal grand jury in January 2004. Not only does the judgment indicate that the conviction offense was a felony, however, but the sentence, about which there is no disagreement, presupposes a felony conviction. Thus, regardless of the defendant's actual belief regarding the conviction offense, he had reason to know, as of 28 June 1976 at the latest, that the conviction offense was a felony. Furthermore, if his guilty plea was involuntary or unintelligent because of omissions on the part of the trial court at the time of the plea, then he had reasons to know that immediately. (Order dated July 8, 2004, Apx at E6-E7).

Lastly, the trial court addressed the Petitioner's argument that the Judgment was illegal which the trial court interpreted as a claim for a "Writ of Habeas Corpus."

(Order dated July 8, 2004, Apx at E7). The court reasoned that since "Attempt to Commit a Felony" was a lesser included offense of the indicted offense then that such sentence was not illegal. (Order dated July 8, 2004, Apx at E8). Ultimately, the trial court concluded that "there is no clerical error in the Judgment, that the Defendant's post conviction claims are untimely, and that there is no grounds for *sua sponte* issuance of a Writ of Habeas Corpus," and denied the Petitioner's motion and petition. (Order dated July 8, 2004, Apx at E10).

On July 15, 2004, the Petitioner timely filed his Notice of Appeal to the Tennessee Court of Appeals. (Notice of Appeal, Apx at D1-D2).

In Penny v. State of Tennessee, 2005 WL 3262929, *4 (Tenn.Crim.App., December 2, 2005) (Opinion, Apx at C1-C23) (NO. E2004-01735-CCA-R3PC), *cert. denied* March 27, 2006, (Order, Apx at A1), the Tennessee Court

of Appeals affirmed the Trial Court's denial of the Petitioner's Motion to Correct the Judgment stating:

> [U]nder these circumstances, we cannot agree with the petitioner's claim that his petition for probation, drafted by his trial counsel, is the most 'reliable indicator' that a clerical error in the judgment may have existed. In addition, regardless of whether we decide the clerical error existed in either of the remaining two court documents, the judgment or the court minutes, the result is the same, the petitioner is a convicted felon.

The Court states, "Although a clerical error may exist, it does not occur in the judgment because it is the only document with internal consistency between the conviction charge and sentence. As such, we conclude the petitioner would not be entitled to a correction of his judgment under Rule 36." Id.

In denying the Petitioner's post-petition conviction and finding that his claims were time barred, the Court of Appeals affirmed the trial court and simply cites to the

exact same language the trial court relied upon in finding the claims time barred. Id.

Lastly, the trial court denied habeas corpus relief. The Tennessee Court of Appeals held that the Petitioner was not entitled because he was "not currently being restrained of his liberty under the 1976 judgment and thus, is not entitled to habeas corpus relief." Id. at *8.

The Petitioner timely filed an Application for Permission to Appeal to the Tennessee Supreme Court and they denied permission for a writ of certiorari on March 27, 2006.

Finally, the Petitioner timely filed the present application of a Writ of Certiorari to the United States Supreme Court.

ARGUMENT

The Tennessee Supreme Court, as a state court of last resort, in denying the writ of certiorari by Mr. Penny and affirming the decision by the Tennessee Court of Appeals has decided an important question of federal law that has not been but should be settled by this Court. Sup. Ct. R. 10(b) & (c).

1. **Whether the Fifth, Sixth and Fourteenth Amendments to the United States Constitution mandate a new rule of law tolling, waiving or suspending the statute of limitations for post conviction proceedings as contained in T.C.A. § 40-30-102 due to the inconsistencies in the record, the unsigned judgment and the severe Boykin violations?**

The United States Supreme Court since its landmark decision in Boykin v. Alabama, 395 U.S. 238 (1969) has mandated that trial courts conduct a *voir dire* with criminal defendants in order to ensure knowing, voluntary and intelligent guilty pleas. The reasoning is clear: "What is at stake for an accused facing death or

imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, (*citations omitted*) and forestalls the spin-off of collateral proceedings that seek to probe murky memories." Boykin, 395 U.S. at 243-244.

The Boykin Court outlined three separate federal constitutional rights that are involved in a criminal defendant's waiver during a guilty plea. Id. at 244. They are the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, the right to trial by jury and the right to confront one's accusers guaranteed by the Sixth Amendment. Id. In order for the waiver to be valid under the Due Process clause, the Supreme Court has held that it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v.

Zerbst, 304 U.S. 458 (1938). If the Defendant's guilty plea is not voluntary and knowing, then such pleas have been obtained in violation of the Due Process clause and are void. Boykin, 395 U.S. at 244.

The State of Tennessee had not adopted Boykin until its landmark decision in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977) some one year after Mr. Penny's case. In Mackey, the Tennessee Supreme Court found Fifth, Sixth and Fourteenth Amendment constitutional deficiencies in the guilty plea procedure in the same Hamilton County Criminal Courts where Mr. Penny pled guilty nearly one year prior.

In Parke v. Raley, 506 U.S. 20 (1992), the United States Supreme Court in reviewing a Kentucky guilty plea held that Boykin did not prohibit state courts from presuming, at least initially, that final judgments of conviction offered for the purpose of a sentencing enhancement were validly obtained. In Parke, the Court

distinguished cases in which the transcript was "suspiciously silent on the question whether the defendant waived constitutional rights." Parke, 506 U.S. at 523-524. The Parke case involved a guilty plea in which a transcript did not exist because state officials at that time did not make a transcript for a guilty plea colloquy. Id. at 524. The Court stated, "we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to government misconduct) that the defendant was not advised of his rights." Id. Due to such reasoning, the Court refused to remove the "presumption of regularity" that attaches to every final judgment. Id. at 523. Furthermore, the United States Supreme Court kept open the possibility of removing such "presumption of regularity" in certain cases when it stated, "we see no good reason to suspend the presumption of regularity here." Id.

In the present case, the Petitioner respectfully submits that this Court should adopt a new rule of law tolling, waiving or suspending the statute of limitations found in T.C.A. § 40-30-102 to collaterally attack a state court sentence in the limited context of when state prosecutors and courts have unconditionally failed to achieve any measure of ensuring that the Petitioner's constitutional rights have been met. The Boykin *voir dire* was clearly mandated by this Court well before the 1976 guilty plea involving Terry Penny and was clearly not done. This amounts to clear 5th, 6th and 14th Amendment violations. Moreover, the record has been haphazardly prepared is constitutionally inadequate leaving three possible scenarios between the unsigned judgment, the courtroom minutes and the Petition for Probation. The trial court and the prosecutors from 1976 left us today with nothing more than an estimated guess as to the Defendant's conviction. Reasonable minds may differ as to the true

nature of the Defendant's guilty plea. Nevertheless, such deficiencies in the record and lack of any intelligent colloquy between the trial court and the Petitioner should be strictly construed against the State, especially when such conviction now becomes the basis of a 18 U.S.C. § 922(g) prosecution some 28 years later. The basic tenants of fundamental fairness and due process in criminal prosecutions require more. The Petitioner respectfully requests for this Court to adopt a new rule of law tolling, waiving and/or suspending the statute of limitations to collaterally attack sentences due to such severe due process violations.

2. **Whether Terry Penny is "in custody" for a Writ of Habeas Corpus under his 1976 conviction because such conviction is now an element of a new charged offense of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)?**

In Maleng v. Cook, 490 U.S. 488, 492 (1989), the United States Supreme held that a Petitioner was not "in

custody" for the purpose of a writ of habeas corpus "merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted."

In Jones v. Cunningham, 371 U.S. 236, 242 (1963), this Court held that a prisoner on parole was "in custody" under his unexpired sentence for habeas corpus purposes. The Court reasoned that the petitioner's release from custody was not unconditional and was based upon his regularly reporting to a parole officer, remaining in the community, his residence, job and refraining from certain activities. Id.

In the present case, the Petitioner pursuant to the Sixth Amendment submits that this Court should extend the Jones rule to include situations in which the government is required to prove the underlying conviction beyond a reasonable doubt as an element of a charged offense. In Mr. Penny's case, the 1976 conviction is not being used to

merely enhance his sentence; it is an element of a charged offense and is entitled to more protection than merely a conviction used at sentencing as contemplated in Maleng.

The Sixth Amendment and the proof beyond a reasonable doubt standard implicated those same constitutional concerns that have opened the Writ of Habeas Corpus door up to other criminal defendants. When the government relies upon past convictions that without them, there would be no criminal violation, then criminal Defendants should be allowed to attack such convictions through the historical nature of Writs of Habeas Corpus.

This conviction plays an integral role in whether Mr. Penny is in "custody" and strikes at the heart of Mr. Penny being "restrained of his liberty."

Respectfully, the Petitioner submits this Court should extend Jones to situations in which the government must prove the existence of a prior conviction beyond a

reasonable doubt to allow individuals to file such writs and challenge constitutional violations in such sentences.

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APPENDIX

SUPREME COURT OF TENNESSEE FILING:

Order,
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TENNESSEE STATE APPEAL COURT FILINGS:

Judgment,
filed 12/02/05 ..... B1-B2

Opinion,
filed 12/02/05 ..... C1-C23

TENNESSEE COUNTY COURT FILINGS:

Notice of Appeal,
filed 07/14/04 ..... D1-D2

Order,
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Notice of Filing
Supplemental Exhibits,
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Ex.B Affidavit of Bryan Hoss, 06/11/04 .. F5-F6

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Petition for Post Conviction-Relief,
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Exhibits:

Ex.A Indictment, 04/01/75 ..... I15-I17

Ex.B Judgment, 06/28/76 ..... I18-I21

Ex.C Minutes, 05/19/76 & 06/28/76 .... I22-I30

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IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT KNOXVILLE
September 27, 2005 Session

TERRY PENNY v. STATE OF TENNESSEE

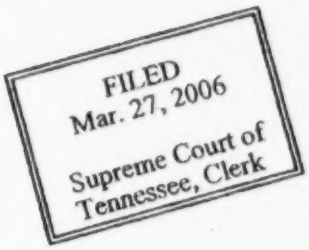
Criminal Court for Hamilton County
Nos. 130199 and 248876

No. E2004-01735-CCA-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Terry Penny and the record before us, the application is denied.

PER CURIAM



IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
September 27, 2005 Session

TERRY PENNY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Hamilton County Nos. 130199, 248876

FILED
Dec. 2, 2005
Court of Criminal Appeals, Tennessee, Clerk

No. E2004-01735-CCA-R3-PC

JUDGMENT

Came the petitioner, Terry Penny, by counsel, and the State, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court of Hamilton County; and upon consideration thereof, this court is of the opinion there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is AFFIRMED, and the case is remanded to the Criminal Court of Hamilton County for execution of judgment of that court and for collection of costs accrued below.

It appearing that the petitioner is indigent, the costs of the appeal are taxed to the State of Tennessee.

ALAN E. GLENN, Judge
JERRY L. SMITH, Judge
NORMA McGEE OGLE, Judge

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT KNOXVILLE
September 27, 2005 Session

TERRY PENNY v. STATE OF TENNESSEE

Direct Appeal from the
Criminal Court for Hamilton County
Nos. 130199, 248876
Douglas A. Meyer, Judge

FILED
Dec. 2, 2005
Court of
Criminal Appeals,
Tennessee, Clerk

No. E2004-01735-CCA-R3-PC

The petitioner, Terry Penny,[1] appeals the post-conviction court's denial of his motion for a corrected judgment and his petition for post-conviction relief arguing his 1976 judgment should be corrected pursuant to Tennessee Rule of Criminal Procedure 36 and his post-conviction petition was not time barred by the statute of limitations. Following our review, we affirm the post-conviction court.

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[1] Throughout his brief, the petitioner spells his name "Terry Penney." However, on the indictment and judgment, it is spelled "Terry Penny." We will use this second spelling.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

C. Leland Davis and Bryan H. Hoss, Chattanooga, Tennessee, for the appellant, Terry Penny.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William H. Cox, III, District Attorney General; and Lila Statom, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In 1975, the petitioner was indicted by the Hamilton County Grand Jury for unlawfully and feloniously selling or delivering a Schedule IV controlled substance, Ethchlorvynol. In 1976, according to the judgment, the petitioner pled guilty to an attempt to commit a felony and was sentenced to eleven months, twenty-nine days, suspended on payments of costs and good behavior for five

years under parole supervision.[2] On March 30, 2004, he filed a motion seeking to correct his 1976 judgment under Tennessee Rule of Criminal Procedure 36,[3] arguing that a clerical error had occurred and that the judgment should have reflected he pled guilty to a misdemeanor and not a felony.[4] The petitioner, noting discrepancies between the judgment, the court minutes from the day of his plea, and his petition for probation,[5] asked the court to correct the

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[2] The petitioner originally pled guilty on May 19, 1976, but the execution of judgment was withheld pending his petition for a suspended sentence. On June 28, 1976, his judgment was executed, with the court granting his petition for a suspended sentence.

[3] Rule 36 provides: "Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Tenn. R. Crim. P. 36.

[4] This motion was filed after the petitioner was indicted in the United States District Court in Chattanooga on February 11, 2004, for two counts of being a felon in possession of a firearm, in violation of Title 18, United States Code, Section 922(g)(1). The predicate offense relied on by the federal government is the petitioner's 1976 conviction which was the subject of this appeal.

[5] The petitioner noted that while his judgment showed he pled guilty to "Attempt to Commit a [F]elony," the May 19, 1976, court minutes showed he pled guilty to "Selling a Controlled Substance" and his petition for a

judgment to reflect that he pled guilty to "selling a controlled substance," which he asserts was a misdemeanor. On April 6, 2004, approximately one week later, he filed a petition for post-conviction relief, asserting that his 1976 "judgment and sentence are illegal and contrary to the laws of the State of Tennessee and United States Constitution in light of the incomplete record" and, in the alternative, that his "conviction is void and/or voidable due to the abridgment of [his] rights guaranteed by the Tennessee Constitution and the Constitution of the United States because he did not enter a knowing, voluntary and understanding plea to a felony offense."

In June 2004, the post-conviction court held a hearing on the motion to correct the judgment and the petition for post-conviction relief. The court denied relief, finding no clerical error in the petitioner's judgment and that the post-conviction relief claims were untimely. In addition, after considering if there were any grounds for a *sua sponte* issuance of a writ of habeas corpus based on the petitioner's claim that his judgment was illegal, the court concluded that neither the conviction nor sentence was

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suspended sentence showed he pled guilty to "simple possession of marijuana."

illegal. The petitioner appealed these rulings, and we will review the issues raised on appeal.

ANALYSIS

I. Correction of Judgment

The petitioner contends the trial court erred in denying his motion, filed under Tennessee Rule of Criminal Procedure 36, to correct judgment to reflect a misdemeanor rather than a felony because, according to his argument, "the entire record including the judgment, courtroom minutes from two different dates, the pleadings and the transcript are all inconsistent to ensure that the offense as contained on the judgment itself was in fact what the [petitioner] agreed to plead guilty to." The State contends that there is no error in the judgment and that the petitioner has no appeal of right under Tennessee Rule of Appellate Procedure 3.

We agree with the State that the petitioner does not have an appeal as of right from the denial of his motion to correct judgment due to clerical errors. Tennessee Rule of Appellate Procedure 3 (b) states:

> In criminal actions an appeal as of right by a defendant lies from any judgment of

> conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b). The denial of a Rule 36 motion to correct a judgment for a clerical error is not covered by Rule 3 and, thus, the petitioner does not have an appeal as of right. Jonathan Malcolm Malone v. State, No. M2004-02826-CCA-R3-CO, 2005 WL 1330792, at *2 (Tenn. Crim. App. June 6, 2005); State v. Greg Smith, No. E2003-01 092-CCA-R3-CD, 2004 WL 305805, at *1 (Tenn. Crim.

App. Feb. 18, 2004) (holding there is no appeal as of right for a trial court's denial of a motion for pretrial jail credits under Rule 3 and even if the "motion could be recast as a motion to correct the sentence, a trial court's order denying a motion to correct a sentence is generally not appealable as a matter of right").

Even accepting, *arguendo*, that the petitioner did have aright to appeal the trial court's denial of his Rule 36 motion, the records upon which he relies do not establish that he is entitled to relief According to the judgment, the petitioner was charged with "FEL. SELLING A CONT. SUBSTANCE" and pled guilty on May 19, 1976, to "ATTEMPT TO COMMIT A FELONY." It also bears the following notation:

> 5/19/76 EXECUTION OF JUDGMENT WITHHELD
> 6/28/76 JUDGMENT ORDERED INTO EXECUTION - PET. FOR SUSPENDED SENTENCE SUSTAINED ON PAYMENT OF COSTS ON OR BEFORE 7/30/76 AND GOOD BEHAVIOR FOR FIVE YEARS UNDER PAROLE SUPERVISION

The May 19, 1976, court minutes state as follows:

> 130199 State v. Terry Penny - Fel. Selling Controlled Substance.

> Came the Attorney General and the [petitioner] in person with his attorney ... and this case came on for hearing before the [c]ourt without a jury on [the petitioner's] plea of guilty.
>
> Upon [the petitioner's] plea and upon proof heard, it is adjudged by the [c]ourt that the [petitioner] is guilty of Selling a Controlled Substance, Schedule IV, and it is the judgment of the [c]ourt that the [petitioner] serve a term of 11 months and 29 days at the Hamilton County Penal Farm, and pay all costs. Execution will issue against the [petitioner] for the costs.
>
> Execution of the judgment is further ordered withheld pending an investigation by the State Parole Office. [The petitioner] is allowed 10 days within which to file a Petition For Suspended Sentence to be heard on June 28, 1976. No bond allowed.

The June 28, 1976, court minutes, the day the petitioner's judgment was executed, state the following:

> 130199 State v. Terry Penny - Fel. Selling Controlled Substance

> The above case came on for hearing on a Petition For Suspended Sentence heretofore filed by [trial counsel], and the [c]ourt, after hearing said petition, is of the opinion same is a proper case for the suspension of the sentence.
>
> Said petition is, therefore, sustained and the sentence hereby suspended upon payment of the costs on or before July 9, 1976, and further conditioned upon the [petitioner's] good behavior for a period of 5 years, under the supervision of the State Parole Office.

Finally, the petition for probation states: "That on the 19th day of May, 1976, the petitioner entered a plea of guilty of possession of marijuana, a misdemeanor, and was sentenced to the workhouse for a period of Eleven (11) months Twenty-Nine (29) days. The case was passed for an investigation by the probation officers."

Thus, according to the judgment, the petitioner pled guilty to an attempt to commit a felony; according to the minutes, he pled guilty to selling a Schedule IV controlled substance; and, according to his petition for probation, he pled guilty to misdemeanor possession of marijuana.

Rule 36 provides that "[c]lerical mistakes in judgments ... maybe corrected by the court at any time and after such notice, if any, as the court orders." Tenn. R.

Crim. P. 36. This court has previously explained that before a trial court can correct a judgment for clerical errors

> "the record in the case must show that the judgment entered omitted a portion of the judgment of the court or that the judgment was erroneously entered. The most reliable indicator that clerical error was made is the transcript of the hearing or other papers filed in connection with the proceedings which show the judgment was not correctly entered."

Donald W. Rhea. Jr. v. State, No. M2003-01034-CCA-R3-CO, 2004 WL343969, at *3 (Tenn. Crim. App. Feb. 24, 2004) (quoting State v. Jack Lee Thomas. Jr., No. 03COI-9504-CR-00109, 1995 WL 676396, at *1 (Tenn. Crim. App. Nov. 15, 1995)). Generally, if there is a discrepancy between the transcript of the sentencing hearing and the court minutes, the transcript prevails. State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991) (citing State v. Zyla, 628 S.W.2d 39, 42 (Tenn. Crim. App. 1981); Farmer v. State, 574 S.W.2d 49, 50 (Tenn. Crim. App. 1978)). Here, however, there was no transcript made of the plea and sentencing proceedings,[6] and we are left to decide

[6] The petitioner attached to his post-conviction petition a notarized statement from the official court

which prevails when there are discrepancies between the judgment (attempt to commit a felony), the court minutes (selling a Schedule IV controlled substance), and the petition for probation (possession of marijuana).

The petitioner urges us to accept the wording of his petition for probation as proof that he pled guilty to a misdemeanor and not a felony because, as he explains,

> [t]he most "reliable indicator" that a clerical error was made is the petition for probation which was signed by the [petitioner], signed by the [petitioner's] attorney, served on the District Attorney's office and verified under oath. Most notably, it is this petition in which the [trial court] states in the courtroom minutes from July 9, 1976 that was *sustained.* And there is nothing in the courtroom minutes that show that the District Attorney's office ever objected to the Petition.

The petition for probation is the only document that purports to show the petitioner pled guilty to a

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reporter for the Hamilton County Criminal Court - Division I, which said she had "listened to the official audiotapes for court proceedings held on May 19, 1976 and June 28, 1976, before [the trial judge], and hard] found that there was no recording made relating to the [petitioner's] case on either date."

misdemeanor, while the other two court documents, the judgment and the minutes, both show he pled guilty to a felony.[7] Under these circumstances; we cannot agree with the petitioner's claim that his petition for probation, drafted by his trial counsel, is the "most 'reliable indicator'" that a clerical error in the judgment may have existed. In addition, regardless of whether we decide the clerical error existed in either of the remaining two court documents, the judgment or the court minutes, the result is the same, the petitioner is a convicted felon.

In its order denying the petitioner relief, the post-conviction court concluded:

> Although the description of the conviction offense in the judgment disagrees with that in the court minutes and the petition for probation, unlike the minutes and the petition, the judgment is internally consistent, *i.e.*, the description of the conviction offense in the judgment is consistent with the sentence. *Compare* Tenn. Code Ann. § 39-603 (transferred, § 39 1 501, 1982, repealed 1989) (making an

[7] Although the petitioner originally claimed in his motion to correct the judgment that selling a controlled substance was a misdemeanor offense, in his appellate brief, he acknowledges that "[i]n 1976, selling a schedule IV controlled substance was a felony."

> attempt to commit a felony punishable by imprisonment in the penitentiary for not more than five (5) years or in the workhouse for not more than one (1) year and by fine not more than five thousand dollars ($5,000)) *with* Tenn. Code Ann. § 52 1432(a), (b) (current 39 6 417(a), (b) (making sale of a schedule IV controlled substance a felony punishable by imprisonment in the penitentiary for two (2) to five (5) years and by fine not more than seven thousand dollars ($7,000.00) and possession of a controlled substance, with inapplicable exception, a misdemeanor). Although it is clear that the record contains one or more clerical errors, considering the internal consistency of the judgment and the lack of such consistency of other documents in the record as well as the absence of a transcript and therefore the absence of inconsistency between the judgment and the transcript, the [c]ourt finds that the judgment is not the location of the error(s).

We agree with the post-conviction court that, although a clerical error may exist, it does not occur in the judgment because it is the only document with internal consistency between the conviction charge and sentence. As such, we conclude the petitioner would not be entitled to a correction of his judgment under Rule 36.

II. Post-Conviction Statute of Limitations

The petitioner seeks post-conviction relief for a judgment that was executed almost thirty years ago. The post-conviction court dismissed the petition as being barred by the statute of limitations. The original Post-Conviction Procedure Act of 1967, which was in effect at the time the petitioner was sentenced, did not include a statute of limitations for seeking relief, allowing a petition to be filed "at any time after [a petitioner] hard] exhausted his appellate remedies and before the sentence hard] expired or had been fully satisfied." Tenn. Code Ann. § 40-30-102 (1982) (repealed 1986). However, the 1986 Post-Conviction Act established a three-year statute of limitations:

> A prisoner in custody under sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or consideration of such petition shall be barred.

Tenn. Code Ann. § 40-30-102 (1990) (repealed 1995). "To ensure that the constitutional requirement of reasonable notice was observed, the Tennessee Supreme Court ruled

that those whose convictions were final before the effective date of the act had three years from July 1, 1986 to file a post-conviction claim." Robert L. Smith. Jr. v. Judge Sterling Gray, No. 01C01-9610-CR-00450, 1997 WL 672664, at *1 (Tenn. Crim. App. Oct. 30, 1997) (citing Abston v. State, 749 S.W.2d 487, 488 (Tenn. Crim. App. 1988), perm. to appeal denied (Tenn. Mar. 16, 1998). Thus, in the present matter, because the petitioner did not file an appeal, the statute of limitations for seeking post-conviction relief as to the petitioner's sentence began to run on July 1, 1986, and expired on July 1, 1989. The petition was filed on April 6, 2004, nearly fifteen years after the statute had run.

In 1995, the legislature enacted the current post-conviction relief act, effective May 10, 1995, which provides that post-conviction petitions are untimely unless they are filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final..." Tenn. Code Ann. § 40-30-102(a) (2003). Since the statute of limitations applicable to the petitioner's post-conviction claims had expired before the enactment of the 1995 Post-

Conviction Procedure Act, that subsequent act did not give him additional time within which to file such claims. See Carter v. State, 952 S.W.2d 417, 419 (Tenn. 1997).

The current post-conviction relief act does contain the following statutory exceptions to the statute of limitations for: (1) claims based upon a new rule of constitutional law applicable to a petitioner's case, (2) claims based upon new scientific evidence showing innocence, and (3) claims based upon enhanced sentences that were enhanced because of convictions subsequently found to be illegal. See Tenn. Code Ann. § 40-30-102(b)(1)-(3) (2003). The petitioner argues that his post-conviction petition is not time-barred by the statute of limitations because, by his view, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), created a newly established constitutional right that permits him to file beyond the statute of limitations period. Specifically, he contends that under Blakely, the maximum sentence the trial judge could have imposed must have been based on facts admitted by the petitioner. He further asserts that because there is no record of his admitting to any facts, other than in his petition for probation where he admitted to

committing a misdemeanor, "Blakely mandates that he can only be sentenced to a misdemeanor."

In considering the Blakely decision, our supreme court concluded that it did not announce a new rule of constitutional law. State v. Gomez, 163 S.W.3d 632, 650 (Tenn. 2005). More importantly for the purposes of this appeal, the Gomez court also noted that the post-conviction standard for determining whether a new rule of constitutional law requires retroactive application, as stated in Tennessee Code Annotated section 40-30-122, does not permit the retroactive application of Blakely in a post-conviction proceeding. Id. at 651 n.16. Blakely, therefore, does not create all exception to the operation of the statute of limitations in this case.

In addition, the petitioner argues the Due Process Clause under both the Tennessee and Unites States Constitutions bars strict application of the statute of limitations because he was never put on notice of the consequences of his guilty plea. While he correctly points out due process dictates that the statute of limitations for post-conviction relief should not be so strictly applied as to deny a person the opportunity to have a claim heard and determined at a meaningful time and in a meaningful

manner, State v. McKnight, 51 S.W.3d 559 (Tenn. 2001); Seals v. State, 23 S.W.3d 272 (Tenn. 2000); Burford v. State, 845 S.W.2d 204 (Tenn. 1992), we cannot conclude that due process tolls the statute of limitations in this case.

To review the alleged defects in the petitioner's plea of guilty, we look to the federal standard announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and the state standard set out in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242, 89 S. Ct. at 1711. Similarly, our Tennessee Supreme Court in Mackey required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542. A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he

fully understands the plea and its consequences. Pettus, 986 S.W.2d at 542; Blankenship, 858 S.W.2d at 904.

The petitioner contends that his guilty plea violated both Boykin and Mackey[8] because "the record is entirely silent as to whether [he] understood his constitutional rights at the time of the pleas." Even accepting *arguendo* that this is true, the petitioner had ample time to contest his guilty plea for being unconstitutional within the statute of limitations period. As discussed above, he had until July 1, 1989, to file a post-conviction petition but failed to do so. In its order denying the petitioner post-conviction relief for being time barred, the post-conviction court concluded:

> The only explanation that the [petitioner] offers for his failure to present his post-conviction claims in a timely petition is that he did not have any reason to know that the conviction offense was a felony until his indictment by a federal grand jury in January 2004. Not only does the judgment indicate that the conviction offense was a felony, however, but the sentence, about which there is no disagreement, presupposes a felony conviction. Thus, regardless of the [petitioner's] actual belief regarding the conviction offense, he had reason to know, as of 28 June 1976 at the latest, that the

[8] We note that Mackey was decided the year after the petitioner's guilty plea.

> conviction offense was a felony. Furthermore, if his guilty plea was involuntary or unintelligent because of omissions on the part of the trial court at the time of the plea, then he had reason to know that immediately.

On appeal, the petitioner argues, among other things, that he waited to file for post-conviction relief because he "had no notice that his conviction was anything other than a misdemeanor." This argument is contradicted by the fact that the judgment clearly reflects that he pled guilty to a felony. Indeed, the petitioner gives no explanation as to why the judgment, alone, did not give him notice that he pled guilty to a felony. The record supports the finding of the post-conviction court in this regard.

III. Habeas Corpus

Finally, we address the post-conviction court's consideration of a *sua sponte* issuance of writ of habeas corpus. The State argues that the petitioner is not eligible for habeas corpus relief under the recent Tennessee Supreme Court decision, Hickman v. State, 153 S.W.3d 16 (Tenn. 2004).

It is well established that the grounds upon which habeas corpus relief may be granted in this state are

narrow. Hickman, 153 S.W.3d at 20 (Tenn. 2004) (citations omitted). Relief will be granted if the petition establishes that the challenged judgment is void. Id. A judgment is void "only when '[i]t appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Id. at 20 (quoting State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000) (citations omitted)). The petitioner bears the burden of establishing either a void judgment or an illegal confinement by a preponderance of the evidence. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). If the petitioner carries this burden, he is entitled to immediate release. Id. Even if the petitioner does not apply for a writ of habeas corpus, Tennessee Code Annotated section 29-21-104 requires:

> Whenever any court or judge, authorized to grant this writ, has evidence, from a judicial proceeding, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of liberty, it is the duty of such court or judge to issue, or cause to be issued, the writ as aforementioned, although no application be made therefor.

Tenn. Code Ann. § 29-21-104 (2000); Cox v. State, 53 S.W.3d 287, 292 (Tenn. Crim. App. 2001), overruled on other grounds by Moody v. State, 160 S.W.3d 512, 515-16 (Tenn. 2005).

The post-conviction court correctly noted that the petitioner's claim that his 1976 judgment was illegal is "in essence, a claim for the writ of habeas corpus" and the court considered it as such. See Cox, 53 S.W.3d at 292 (noting that "the better method of challenging illegal or void sentences is via an application for a writ of habeas corpus"). Although he did not file a petition, any habeas corpus petition that the petitioner may have filed would have had to assert that he was "illegally restrained of liberty" by his 1976 judgment. Tenn. Code Ann. § 29-21-107(b)(1) (2003). We find the petitioner is not currently being restrained of his liberty under the 1976 judgment and, thus, is not entitled to habeas corpus relief.

In Hickman, 153 S.W.3d at 19, our supreme court dealt with a set of facts very similar to those of the present appeal. The defendant in Hickman, facing a sentence enhancement in federal court based on an expired 1986 misdemeanor judgment, sought habeas corpus relief in 2002, challenging the validity of the expired judgment. Affirming

the trial court's dismissal of the habeas corpus petition, the court explained that a person is not "restrained of liberty" for purposes of the habeas corpus statute unless the challenged judgment itself imposes a restraint upon the petitioner's freedom of action or movement. Use of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a habeas corpus challenge to the original conviction long after the sentence on the original conviction has expired.

Id. at 23 (footnote omitted). Here, the petitioner has not, and cannot, claim that he is presently being confined under the 1976 judgment. Instead, he is confined because he is awaiting trial on a federal indictment, for which the 1976 judgment is only a predicate offense. As such, we find that the petitioner is not entitled to habeas corpus relief because he is not being "restrained of liberty" by his 1976 conviction.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the order of the post-conviction court.

/s/ Alan E. Glenn
ALAN E. GLENN, JUDGE

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE	:	
	:	**No. 130199**
v.	:	**Division I**
	:	
TERRY PENNY	:	FILED July 14, 2004
	:	
	:	County Court, Tennessee, Clerk
TERRY E. PENNEY,	:	
	:	
Petitioner,	:	**No. 248876**
v.	:	**Division I**
	:	
STATE OF TENNESSEE,	:	
	:	
Respondent.	:	

NOTICE OF APPEAL

Notice is hereby given, pursuant to Tennessee Appellate Procedure Rule 3 (b), the Defendant and Petitioner, Terry E. Penney, above named, by and through his attorney, Lee Davis, hereby appeals to the Court of Criminal Appeals the Court Orders of July 8, 2004, when the Court Ordered the following:

1) that the subject motion to correct the judgment in case 130199 be denied and

2) that the subject petition for relief from the conviction or sentence in case 130199 be dismissed.

Respectfully submitted,

DAVIS & WALLACE, PC

/s/ Lee Davis
Lee Davis, BPR #15958
508 E. 5th Street
Chattanooga, TN 37403
(423) 266-0605
(423) 266-0687 Fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Notice has been served upon the Honorable Paul G. Summers, State of Tennessee Attorney General, 425 Fifth Avenue North, 2nd Floor, Nashville, TN 37243-0435; and Assistant District Attorney Lila Statom, 600 Market Street, Chattanooga, TN 37402, this the 14th day of July, 2004.

/s/ Lee Davis
Lee Davis

COURT MET PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE DOUGLAS A. MEYER, JUDGE, WHEN THE FOLLOWING PROCEEDINGS WERE HAD TO-WIT:

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE	:	
	:	
v.	:	**No. 130199**
	:	**Division I**
TERRY PENNY	:	
	:	
TERRY E. PENNEY,	:	
	:	
Petitioner,	:	
v.	:	**No. 248876**
	:	**Division I**
STATE OF TENNESSEE,	:	
	:	
Respondent.	:	

FILED
July 8, 2004

County Court,
Tennessee, Clerk

ORDER

Before the Court are the defendant's 30 March 2004 motion, pursuant to Tenn. R. Crim. P. 36, to correct the judgment in case 130199 to reflect a conviction offense of sale of a controlled substance instead of attempt to commit a felony and 6 April 2004 petition, pursuant to Tenn. Code

Ann. §§ 40 30 101-22, for relief from the conviction or sentence in the same case. As grounds therefore, the Court understands him to allege as follows:

(1) that, on 19 May 1976, he pled guilty or thought he was pleading guilty to a misdemeanor, sale of a controlled substance;

(2) that the judgment contains a clerical error in that it reflects that he pled guilty to a felony, attempt to commit a felony, or, if it does not contain such an error, then his guilty plea was involuntary or unintelligent because he thought he was pleading guilty to a misdemeanor and the trial court did not ascertain the voluntary and intelligent nature of the plea;

(3) that a transcript of the plea is unavailable and therefore does not reflect the voluntary and intelligent nature of the plea, as *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) requires;

(4) that the judgment is illegal;

(5) that a clerical error in a judgment is subject to correction by the trial court at any time under Rule 36;

(6) that the statute of limitations applicable to post-conviction claims should not apply to his post-conviction claims or due process should preclude its strict application; and

(7) that an illegal sentence is subject to correction by the trial court at any time under *State v. Burkhart*, 566 S.W.2d 871 (Tenn. 1978).

In support of his requests for relief, the defendant submits relevant records from case 130199 as well as the 29 March 2004 affidavit of Abigail M. Pearce, who is the official court reporter for Division I of the Criminal Court for Hamilton County, Tennessee and who certifies that the official audiorecordings of court proceedings before Judge Campbell Carden on 19 May and 28 June 1976 do not contain the proceedings in case 130199 on either date.

The Court first addresses the claim that the judgment contains a clerical error that is subject to correction at any time pursuant to Rule 36. The record in case 130199 reflects that the defendant was charged with a felony, sale of ethchlorvynol, a schedule IV controlled substance, but variously describes the offense to which he pled guilty on 19 May 1976 as attempt to commit a felony

(the judgment and the rule docket), sale of a schedule IV controlled substance (the minutes), and possession of marijuana (the petition for probation). There is no disagreement in the record, however, that the defendant was sentenced to the county workhouse for eleven (11) months, twenty-nine (29) days or that, on 28 June, the sentence was suspended for five (5) years.

Although the description of the conviction offense in the judgment disagrees with that in the court minutes and the petition for probation, unlike the minutes and the petition, the judgment is internally consistent, *i.e.*, the description of the conviction offense in the judgment is consistent with the sentence. *Compare* Tenn. Code Ann. § 39 603 (transferred, § 39 1 501, 1982, repealed 1989) (making an attempt to commit a felony punishable by imprisonment in the penitentiary for not more than five (5) years or in the workhouse for not more than one (1) year and by fine not more than five thousand dollars ($5,000.00)) *with* Tenn. Code Ann. § 52 1432(a), (b) (current § 39 6 417(a), (b)) (making sale of a schedule IV controlled substance a felony punishable by imprisonment in the penitentiary for two (2) to five (5) years and by fine not more than seven thousand dollars ($7,000.00) and

possession of a controlled substance, with inapplicable exception, a misdemeanor). Although it is clear that the record contains one or more clerical errors, considering the internal consistency of the judgment and the lack of such consistency of other documents in the record as well as the absence of a transcript and therefore the absence of inconsistency between the judgment and the transcript, the Court finds that the judgment is not the location of the error(s).

The Court next considers the post-conviction claim that the defendant's guilty plea was involuntary or unintelligent because he thought he was pleading guilty to a misdemeanor and the trial court did not ascertain the voluntary and intelligent nature of the plea. As the defendant acknowledges, the subject petition is timely tinder neither the former nor the current statute of limitations. *See State v. Masucci*, 754 S.W.2d 90, 91 (Tenn. Crim. App. 1988) (holding that the three-year limitation period for judgments that were final before 1 July 1986, the effective date of Tenn. Code Ann. § 40 30 102 (repealed 1995), did not commence until that date); Tenn. Code Ann. § 40 30 102 (reducing the limitation period to one (1) year).

He contends, however, that the statute should not apply or due process precludes its strict application in his case.

No statutory exception to the limitation period applies in the defendant's case. *See* Tenn. Code Ann. § 40 30 1 02(b) (excepting only claims involving violation of a new and retroactive constitutional right, new, scientific proof of innocence, and invalidation of certain prior convictions from the current one-year limitation period). Likewise, although due process precludes strict application of "'procedural requirements such as statutes of Limitation'" effectively to deny a potential litigant an opportunity to present his claim(s) "'at a meaningful time and in a meaningful manner[,]'"[1] the constitutional exception to the limitation period does not apply in the defendant's case, both of his claims predating commencement of the limitation period.

The only explanation that the defendant offers for his failure to present his post-conviction claims in a timely petition is that be did not have any reason to know that the

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[1] *See State v. McKnight*, 51 S.W.3d 559, 563 (Tenn. 2001) (recognizing the existence of a constitutional exception to strict application of procedural requirements) (quoting *Seals v. State*, 23 S.W.3d 272, 277-78 (Tenn. 2000)).

conviction offense was a felony until his indictment by a federal grand jury in January 2004. Not only does the judgment indicate that the conviction offense was a felony, however, but the sentence, about which there is no disagreement, presupposes a felony conviction. Thus, regardless of the defendant's actual belief regarding the conviction offense, he had reason to know, as of 28 June 1976 at the latest, that the conviction offense was a felony. Furthermore, if his guilty plea was involuntary or unintelligent because of omissions on the part of the trial court at the time of the plea, then he had reason to know that immediately.

Finally, the Court considers the claim that the judgment is illegal, which is, in essence, a claim for the writ of *habeas corpus*. *Cox v. State*, 53 S.W.3d 287; 292 (Tenn. Crim. App. 2001) (holding that the proper procedure for challenging an illegal or void sentence is by an application for the writ of *habeas corpus*). Even absent an application or complete application for the writ of *habeas corpus*, under Tenn. Code Ann. § 29 21 104, it is the duty of a court to issue the writ when it "has evidence, from a judicial proceeding, that any person within [its] jurisdiction ... is illegally imprisoned or restrained of liberty." The

Court therefore considers whether it has such evidence in the defendant's case.

The defendant does not specify the illegality of which he complains. To the extent that he alleges that the involuntary or unintelligent nature of the plea or the unavailability of a transcript of the plea renders the judgment void, the Court respectfully disagrees. *See Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993) (holding that the involuntary or unintelligent nature of a guilty plea does not render a judgment void, merely voidable); *Taylor v. State*, 2003 Tenn. Crim. App. LEXIS 849, * 11 (noting that, "[w]hen there is no adequate transcript to establish that a guilty plea complies with *Boykin*, the burden is on the state to prove the plea was [voluntary and intelligent,]" thereby implying that the unavailability of a transcript does not render a judgment void, merely voidable) (citing *Chamberlain v. State*, 815 S.W.2d 534, 540-41 (Tenn. Crim. App. 1991)).

The trial court had jurisdiction to convict the defendant of attempt to commit a felony, which was a lesser, included offense of the indictment offense, to sentence the defendant to the county workhouse for eleven (11) months, twenty-nine (29) days, and to suspend the

sentence for five (5) years. *See State v. Staggs*, 554 S.W.2d 620, 624 (Tenn. 1977) (holding that attempt to commit a felony is a lesser included offense of any felony or crime punishable by imprisonment in the state penitentiary, absent other prescription for punishment); Tenn. Code. Ann. § 39 603 (transferred to § 39 1 501 1982, repealed 1989) (making an attempt to commit a felony punishable by imprisonment in the penitentiary for not more than five (5) years or in the workhouse for not more than one (1) year and by fine not more than five thousand dollars ($5,000.00)); Tenn. Code Ann. § 40 2901 (transferred to § 40 21 101 1982, repealed 1989) (authorizing, with inapplicable exceptions, suspension of a sentence for a period equal to the minimum sentence but not more than the maximum sentence for the defendant's offense). The Court concludes that there is no illegality in either conviction or sentence.[2]

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[2] If the defendant had been convicted of possession of marijuana, a schedule VI substance, then he would have been convicted of an offense with which he was not charged, the probationary period of felony length would have been unauthorized, and, as a consequence, the judgment would have been illegal. *See State v. Campbell*, 549 S.W.2d 952, 956 (Tenn. 1977) (holding that the sale of two or more differently scheduled controlled substances constitutes separate and distinct offenses under the Tennessee Drug Control Act of 1971).

Finding, for the preceding reasons, that there is no clerical error in the judgment, that the defendant's post-conviction claims are untimely, and that there is no ground for *sua sponte* issuance of the writ of *habeas corpus*, the Court ORDERS as follows:

(1) that the subject motion to correct the judgment in case 130199 be denied and

(2) that the subject petition for relief from the conviction or sentence in case 130199 be dismissed.

SO ENTER on this 8th day of July, 2004.

/s/ Douglas A. Meyer
Criminal Court Judge

THEREUPON, COURT ADJOURNED PENDING FURTHER BUSINESS OF THE COURT.

/s/ Douglas A. Meyer
JUDGE DOUGLAS A. MEYER

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	*	**NO. 130199**
	*	
vs.	*	**DIVISION I**
	*	
TERRY E. PENNEY,	*	FILED June 11, 2004
	*	
DEFENDANT.	*	County Court, Tennessee, Clerk

NOTICE OF FILING SUPPLEMENTAL EXHIBIT

COMES NOW, the Defendant Terry E. Penney, by and through his counsel, and with permission of the Court, and hereby files this Notice of Filing Supplemental Exhibits, attached herein as "Exhibit A." As stated in the letter from John Patterson, District Director of the State of Tennessee Board of Probation and Parole, "there is no record of probation or parole supervision with the Tennessee Board of Probation and Parole," for Terry E. Penney. Also attached is an Affidavit of Bryan H. Hoss, attached herein as "Exhibit B."

Respectfully submitted,

DAVIS & WALLACE, PC

/s/ Brian H. Hoss
Bryan H. Hoss, BPR # 17168
508 E. 5th Street
Chattanooga, TN 37403
(423) 266-0605
(423) 266-0687 Fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this motion has been served upon Lila Statom, Assistant District Attorney, 600 Market Street, Chattanooga, TN 37402, and Boyd Patterson, Assistant District Attorney, 600 Market Street, Chattanooga, TN 37402, by placing same in the United States mail with sufficient postage thereon to carry same to its destination on this the 11 day of June, 2004.

/s/ Bryan H. Hoss
Bryan H. Hoss

STATE OF TENNESSEE
BOARD OF PROBATION AND PAROLE
540 McCallie Ave., Suite 250
Chattanooga, TN
Phone: (423) 634-6333
FAX: (423) 634-6364

June 3, 2004

EXHIBIT
A

Davis & Wallace, PC
Bryan H. Hoss
508 E. 5th Street
Chattanooga, TN 37403

RE: Terry Penney
Docket No. 130199

Dear Mr. Hoss:

This is in regards to your letter dated May 12, 2004, which included a subpoena from the Untied States District Court.

We have searched the TOMIS (Tennessee Offender Management Information System) database and there is no record of probation or parole supervision with the

Tennessee Board of Probation and Parole for your client. We searched by name, birth date and social security number.

If you have any questions please fee free to call me.

Thank you,

/s/ John Patterson
John Patterson
District Director

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	*	**NO. 130199**
	*	
vs.	*	**DIVISION I**
	*	
TERRY E. PENNEY,	*	
	*	
DEFENDANT.	*	

EXHIBIT B

AFFIDAVIT OF BRYAN H. HOSS

BRYAN H. HOSS, being first duly sworn in accordance with law, deposes and says:

1. My name is Bryan H. Hoss. I am an attorney in the law firm of Davis & Wallace, P.C. and I currently represent Terry E. Penney, along with Lee Davis.

2. On May 12, 2004, I subpoenaed District Director John Patterson of the State of Tennessee Board of Probation and Parole requesting any and all records referring to any parole or probation supervision on Criminal Court number 130199 for Terry E. Penney.

3. On June 3, 2004, Mr. John Patterson responded in a letter stating, "there is no record of probation or parole supervision with the Tennessee Board of Probation and Parole." A copy of this letter is attached as Exhibit "A."

FURTHER AFFIANT SAITH NOT.

/s/ Bryan H. Hoss
BRYAN H. HOSS

Sworn to and subscribed before me
This 11 day of June, 2004.
8-2-07
NOTARY PUBLIC
My Commission Expires: /s/ Mildred H. Gandy

STATE OF TENNESSEE	*	**NO. 130199**
	*	**IN THE CRIMINAL**
VS.	*	**COURT FOR**
	*	**HAMILTON COUNTY,**
TERRY EUGENE PENNEY	*	**TENNESSEE**
	*	**DIVISION I**

STATE'S RESPONSE TO DEFENDANT'S MOTION TO CORRECT JUDGMENT

Comes now the State of Tennessee, by and through the Office of the District Attorney General and moves this Honorable Court to deny the defendant's motion to correct judgment.

FILED
June 4, 2004
County Court,
Tennessee, Clerk

STATEMENT OF FACTS

On April 1, 1975, a one-count indictment was returned against the defendant by a grand jury sitting in Hamilton County, Tennessee, charging him with Feloniously Selling or Delivering a Controlled Substance to wit: Ethchlorvynol (Schedule IV). The parties reached an agreement wherein the defendant pled guilty to a lesser offense, namely, Attempt to Commit a Felony, in violation of Tennessee Code Annotated Section 39-603 (orig. ed.), as amended, T.C.A. Section 39-1-501, Attempt to Commit a Felony. The maximum punishment for this felony offense was five (5) years incarceration.

As part of his plea, the defendant was sentenced in the Hamilton County Criminal Court on May 19, 1976, to confinement for eleven (11) months and twenty-nine (29) days. This sentence was later suspended on June 28, 1976, on payment of costs on or before July 30, 1976, and good behavior for five (5) years under parole supervision. (See attached)

Nearly thirty (30) years later, the defendant committed a new offense wherein he was charged in Federal Court in counts seven (7) and twelve (12) with Violating 18 U.S.C. Section 922(g)(1) (felon in possession of a weapon). In Federal Court on March 11, 2003, the defendant filed a motion to dismiss the felon in possession of a firearm counts in the indictment alleging that "the defendant pled guilty to the misdemeanor crime of Attempt to *Commit* a Felony." (See attached). After the United States responded to the defendant's motion and the Federal Court had declined to dismiss the motion finding that the crime was in fact a felony, the defendant then filed a reply to the United States' response on March 25, 2003, and stated that "[t]he government's contention that the defendant pled to Attempt to Commit a Felony is simply not true nor accurate" (See attached).; The defendant also has cited the minutes as reflecting that defendant pled to a

misdemeanor. (See attached minutes). The minutes do not state that the defendant pled to a misdemeanor.

ARGUMENT

Rule 36 of the Rules of Criminal Procedure provides that "clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, and the Court orders."

The Court speaks through its orders and not its minutes. United States v. Holloway, 142 F.3d 437 (6th Cir. Mar. 4, 1998). In the Holloway case, the defendant argued that the State Court minute entries were at odds with the Tennessee Court's judgment and that the Court should look to the minute entries, not the judgment to determine the nature of the Tennessee conviction. The Court found that it is the judgment that should be relied upon.

The defendant cites his petition for probation as a basis for his motion to correct judgment. This is his work product and not a statement by the Court that should be construed as authoritative in any respect. Further, the petition on close reading reveals that defendant's claim is inaccurate and a misstatement of facts. The defendant's

mischaracterization of his conviction as a misdemeanor does not have the effect of magically transforming his felony conviction into a misdemeanor and transform the type of drug he possessed into another type of drug regardless of how much he hopes it to be. It appears that the defendant is now claiming a third story that he pled to misdemeanor possession of marijuana.

The judgment in this case is the order of this Court. There is nothing to support his contention that he pled to the misdemeanor crime of possession of marijuana. In fact, the indictment was for an entirely different scheduled drug.

It appears that the defendant's version of the facts and theory of his case evolves constantly to suit his needs at the time. This case is no different than Holloway. The judgment of conviction clearly shows that the defendant pled to Attempt to Commit a Felony. There was no objection through five (5) years of parole supervision. There was no objection to the judgment for nearly thirty (30) years. The defendant is of dubious credibility given his constant evolving story. There is no basis for his motion to correct judgment.

For the foregoing reasons, the state respectfully requests that the defendant's motion be denied.

Respectfully submitted,

WILLIAM H. COX, III
DISTRICT ATTORNEY GENERAL

BY: /s/ Lila Statom
LILA STATOM
ASSISTANT DISTRICT ATTORNEY

STATE OF TENNESSEE	*	**NO. 130199**
	*	**IN THE CRIMINAL**
VS.	*	**COURT FOR**
	*	**HAMILTON COUNTY,**
TERRY EUGENE PENNEY	*	**TENNESSEE**
	*	**DIVISION I**

FILED
June 4, 2004
County Court,
Tennessee, Clerk

MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF

The Office of the District General, prosecuting on behalf of the State of Tennessee, respectfully moves this Court to dismiss the defendant's Petition for Post-Conviction. The State would show as follows:

The Defendant pled guilty on May 19, 1976, to Attempt to Commit a Felony. On June 17, 1976, the Petitioner filed a motion to suspend his sentence. The Court granted the Petitioner's motion for a suspended sentence on June 28, 1976. His sentence was suspended on payment of costs on or before July 30, 1976, and good behavior for five (5) years under parole supervision. The Defendant filed his Petition for Post-Conviction Relief on April 6, 2004, twenty-eight (28) years after his plea.

At the time the defendant pled, a prisoner could petition for post-conviction relief at any time after appellate remedies had been exhausted or before the sentence had expired. However, on July 1, 1986, the General Assembly

established a three (3) year statute of limitations. See T.C.A. Section 40-30-102 (repealed 1995). In 1995, our legislature adopted the new Post-Conviction Act, which is applicable to all petitions filed after May 10, 1995. The most recent act reduced the statute of limitations to a one (1) year statute of limitation.

Under T.C.A. 40-30-102(a), a Petition for Post-Conviction Relief must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred." However, this is not the statute of limitation that was in effect at the time that the defendant pled in this case. In State v. Carter, 952 S.W.2d 417 (Tenn. 1997), the Supreme Court found that petitioners for whom the statute of limitations expired prior to the effective date of the Post-Conviction Procedure Act of 1995, i.e. May 10, 1995, were not entitled to an additional year in which to file their petition.

Therefore, the defendant's claim is time-barred and can no longer be raised unless he meets one of the exceptions set forth in the most recent statute. The State

submits that the defendant's time period for filing expired three (3) years from the enactment of the 1986 statute. In any event, if the Court applied the 1995 statute, the statute of limitations would have, at the latest, expired one (1) year from the passage of the 1995 statute. Regardless of which statute is applied, the defendant's claim is barred.

There are three (3) exceptions to the limitation period listed in the 1995 statute. The defendant's case does not meet any of the criteria set out III that statute. First, T.C.A. 40-30-102(b)(1) sets an exception for a newly established constitutional right that did not exist at the time of trial. There is no new constitutional right applicable to this case. Second, T.C.A. 40-30-102(b)(2) sets an exception for newly discovered evidence. The defendant is not claiming that this particular exception applies. Finally, T.C.A. 40-30-102(b)(3) sets an exception where the defendant "seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted is not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid ... "The defendant's reliance on this section is also be misplaced, in that, the defendant is this case pled guilty with an agreed upon

sentence. See State v. Jenkins, 2001 Tenn. Crim. App. LEXIS 1002 (Tenn. Crim. App. 2001).

Furthermore, the defendant in his response incorrectly cites this third exception. The defendant sets forth in his petition that "the judgment in his case amounts to an illegal judgment and illegal sentence." Even if the claim was not time-barred, such a claim is not a matter within the purview of the post-conviction statute. Because the defendant's petition is time-barred and no exceptions apply to allow the defendant to file a later petition, the state need not address the Issues of whether or not the defendant entered a knowing, voluntary and understanding plea.

Finally, defendant has asserted no facts justifying the tolling of the statute. See State v. Burford, 845 S.W.2d 204 (Tenn. 1992) and Sands v. State, 903 S.W.2d 297 (Tenn. 1995). The defendant has offered no explanation as to why his petition was filed twenty-eight (28) years after he pled guilty. All the issues that he raises in his present petition arose before the statute of limitation began to run. He had a reasonable opportunity to raise all his issues before the statute of limitations expired.

For the foregoing reasons, the state respectfully requests that the defendant's petition for post-conviction relief be dismissed.

Respectfully submitted,

WILLIAM H. COX, III
DISTRICT ATTORNEY GENERAL

BY: /s/ Lila Statom
LILA STATOM
ASSISTANT DISTRICT ATTORNEY

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

TERRY E. PENNEY,	*	
	*	
PETITIONER,	*	**NO.**
	*	
vs.	*	**DIVISION I**
	*	
STATE OF TENNESSEE,	*	**JUDGE MEYER**
	*	
DEFENDANT.	*	

FILED
Apr. 6, 2004
County Court,
Tennessee, Clerk

PETITION FOR POST-CONVICTION RELIEF

COMES NOW, the Petitioner, Terry E. Penney, and files this Petition for Post Conviction Relief pursuant to T.C.A. § 40-30-101 *et al.* Petitioner is challenging his guilty plea in Case No. 130199, Hamilton County Criminal Court, Division I, entered on May 19, 1976.

The Petitioner submits that relief is mandated pursuant to the Tennessee Post-Conviction Procedure Act for two reasons. First, the underlying judgment and sentence are illegal and contrary to the laws of the State of Tennessee and United States Constitution in light of the incomplete record. State v. Burkhart, 566 S.W.2d 871

(Tenn. 1978); *See Also* State v. Hamlin, 655 S.W.2d 200, 201 (Tenn. Crim. App. 1983). And second, the Petitioner's conviction is void and/or voidable due to the abridgement of the Petitioner's rights guaranteed by the Tennessee Constitution and the Constitution of the United States because he did not enter a knowing, voluntary, and understanding plea to a felony offense. T.C.A. § 40-30-103; Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969); Chamberlain v. State, 815 S.W.2d 534 (Tenn. Crim. App. 1990).

As grounds thereto the Petitioner would show the following:

1. On April 1, 1975, the Petitioner was indicted for feloniously selling a scheduled IV controlled substance. A copy of that indictment is attached hereto as "Exhibit A."

2. On May 19, 1976, the Petitioner pled guilty and received a sentence of 11 months and 29 days. The execution of judgment was withheld on that date. A copy of the judgment is attached hereto as "Exhibit B." The judgment erroneously reflects that the Petitioner pled guilty to an attempt to commit a felony. The courtroom minutes show the Petitioner actually pled guilty to the misdemeanor

of selling a controlled substance. A certified copy of the courtroom minutes is attached hereto as "Exhibit C."

3. On May 19, 1976, the Petitioner, through counsel, filed a petition for suspended sentence and stated under oath that he pled guilty to simple possession of marijuana, a misdemeanor. A copy of the petition is attached hereto as "Exhibit D."

4. On June 28, 1976, the Court granted the Petitioner's motion for a suspended misdemeanor sentence of 11 months and 29 days.

5. The minutes from Division I of Hamilton County Criminal Court show that the Petitioner was in Court, represented by counsel before the Honorable Campbell Carden, on May 19 and June 28, 1976. The official court reporter for Division I, Abigail M. Pearce, has listened to the official audio tapes for court proceedings held on May 19 and June 28, 1976 before Judge Carden. The actual in-court proceedings for these dates do not reflect any colloquy between the Court and Petitioner or counsel for Petitioner. A certificate from the official reporter is attached hereto as "Exhibit E."

6. The audio tape of the guilty plea on May 19, 1976 and the audio tape of the hearing on the Petitioner's

motion for a suspended sentence on June 28, 1976 do not affirmatively show that the Petitioner voluntarily, understandingly and knowingly entered the plea to attempt to commit a felony.

7. The following documents constitute the entire record of the guilty plea proceedings in case number 130199, Division I of the Criminal Court of Hamilton County. Those documents are:

i. Courtroom minutes of May 19, 1976, Exhibit "C";

ii. Courtroom minutes of June 28, 1976, Exhibit "C";

iii. Petition for probation, dated June 16, 1976, Exhibit "D";

iv. Transcript certifying that the official court reporter listened to the audio tapes for the court proceedings held May 19 and June 28, 1976. Exhibit "E."

1. THE UNDERLYING JUDGMENT AND SENTENCE ARE ILLEGAL AND CONTRARY TO THE LAWS OF TENNESSEE AND THE UNITED STATES IN LIGHT OF THE INCOMPLETE RECORD.

One of the first inquiries that a trial court must make is whether a claim for post-conviction relief was

timely filed. T.C.A. § 40-30-102. The original Post-Conviction Act of 1967 did not include a statute of limitations. Effective July 1, 1986, the General Assembly adopted a three year statute of limitations. T.C.A. § 40-30-102 (repealed 1995). In consequence, any petitioner whose judgment had become final before July 1, 1986 had only three years after this date to file a petition for post-conviction relief. State v. Masucci, 754 S.W.2d 90 (Tenn. Crim. App. 1988).

Under the new Act, the trial court is required to dismiss a petition filed after the expiration of the limitations period, unless (1) the claim is based on a. newly established constitutional right; (2) the claim is based on scientific evidence showing innocence; or (3) the petitioner is serving a sentence that was enhanced by a no longer valid prior conviction. Tenn. Code Ann. § 40-30-202(b).

The Defendant/Petitioner, Terry Penney, presents two claims. First, Terry Penney asserts that the judgment in his case amounts to an illegal judgment and illegal sentence. The Tennessee Appellate Courts have held that such a claim is an exception to the statute of limitations. The Tennessee Supreme Court has also held as a general rule that a trial judge may correct an illegal...sentence ***at any***

time. State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978). In the context of a post-conviction petition, the Tennessee Court of Appeals has also held that the statute of limitations does not bar a Defendant's claim that his sentence is illegal. Abston v. State, 1998 WL 906475 (Tenn. Crim. App. 1998); *See Also*, House v. State, 1999 WL 39019 (Tenn. Crim. App. 1999) *citing* State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987) (noting that generally, an illegal judgment may be noticed at any time, even after it becomes final). Respectfully, the Petitioner asserts that his claims that the judgment and his sentence are illegal are not barred by the statute of limitations and this Court should set a hearing to determine the issues raised herein.

2. THE PETITIONER'S CONVICTION IS VOID AND/OR VOIDABLE BECAUSE THE DEFENDANT DID NOT VOLUNTARILY, UNDERSTANDINGLY & KNOWINGLY ENTER A PLEA TO A FELONY.

Additionally, the Petitioner asserts that his second claim is also not barred by the statute of limitations. Burford v. State, 845 S.W.2d 204 (Tenn. 1992). The Petitioner claims that his conviction is void and/or voidable due to the violation of his constitutional rights in that he did not enter a voluntary, understanding and knowing plea to

attempt to commit a felony. The Petitioner pled guilty on May 19, 1976. Prior to July 1, 1986, there was no statute of limitations applicable to criminal defendants. In the present case, the Petitioner received 11 months 29 days suspended on his good behavior and had no reason to believe such plea was to a felony offense, that is attempt to commit a felony, as contained in his judgment and as the federal government is now claiming.

The Petitioner is currently being prosecuted in Federal Court and is being held without a bond in part for being a felon in possession of a handgun in violation of 18 U.S.C. § 922(g). The government is using his May 1976 conviction as the predicate offense for 18 U.S.C. § 922(g). However, the Petitioner pled guilty to a misdemeanor in May, 1976 as reflected by the courtroom minutes and the petition for a suspended. See Exhibits C & D.

The Petitioner asserts that the statute of limitations for post-conviction petitions should not apply to him in that he never received any notice that he pled guilty to a felony. He had actual knowledge that he pled to a misdemeanor. There was never a colloquy in court. The record is completely devoid of any evidence that the Petitioner

believed that it was a felony or that he understood and knew to what he was pleading guilty.

Furthermore, at the time of the Petitioner's plea and under the status of the law in Tennessee at the time, the Petitioner never lost any rights as a result of his plea. He could lawfully vote. He could lawfully possess a firearm. Based upon the complete lack of record, lack of colloquy, and lack of any evidence to support that this was in fact a felony, the Petitioner asserts that his post-conviction petition is timely. Never has any agent of the State of Tennessee ever alleged that he was convicted of a felony, only the federal government has alleged that it was a felony in a recent January, 2004 indictment. Respectfully, the Petitioner submits that the statute of limitations should not apply to him or in the alternative, that the statute of limitations as applied deprives him of his due process rights under both the Tennessee and United States Constitution. The statute of limitations as applied amounts to trial by ambush if this Defendant is precluded from attacking this plea by the statute of limitations for post-conviction petitions.

In Boykin v. Alabama, 39 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969), the United States Supreme Court

ruled that when a defendant enters a plea of guilty, the transcript of the proceeding must affirmatively show that the defendant voluntarily, understandingly and knowingly entered the plea. If the transcript does not establish this fact, the plea is constitutionally infirm. The transcript in Boykin reveals that, "the trial judge asked no questions of Petitioner concerning his plea, and defendant did not address the Court." Boykin v. Alabama, 395 U.S. at 239, 89 S.Ct. at 1710, 23 L. Ed. 2d at 277 *quoted* in Chamberlain v. State, 815 S.W.2d 534, 538 (Tenn. Crim. App. 1990). In Chamberlain, the Court of Criminal Appeals Tennessee further quotes Boykin and states that, "it was error, plain on the face of the record, for the trial judge to accept Petitioner's guilty pleas without an affirmative showing that is was intelligent and voluntary." Chamberlain, 815 S.W.2d at 539.

Recognizing that there problems with guilty plea procedures in Hamilton County and throughout Tennessee, the Tennessee Supreme Court created a procedure that mandated compliance with Boykin. This procedure was enunciated by the Tennessee Supreme Court in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). The Petitioner's plea occurred seven years after the Boykin decision and is

contemporaneous with Mackey. The appellate courts of this state have applied the mandate of Boykin and established the procedures that are now enumerated in Rule 11 and Mackey.

Specifically, Boykin, Rule 11(c) and Mackey require that the trial judge address the Defendant personally in open court. Boykin, Rule 11(c), and Mackey require that the trial judge explain certain information and constitutional rights to the Defendant, and the trial court must ascertain whether the Defendant understands the information and his constitutional rights. The Petitioner asserts that he was never personally addressed in open court nor were his constitutional rights explained to him in his 1975 plea. Specifically, the Petitioner was never addressed regarding (i) the nature of the offense to which the plea was offered; (ii) the mandatory minimum and maximum penalty prescribed by law; (iii) the right to plead not guilty; (iv) the right to trial by jury; (v) the right to assistance of counsel; (vi) the right to confront and cross-examine the state's witnesses; (vii) the privilege against self incrimination; (viii) the fact that a plea of guilty waives the right to a trial; (ix) whether different or additional punishment may result by reason of a prior conviction; (x)

that evidence of any conviction, including the conviction that he was serving in 1976, could be used against him in the future; (xi) whether there was a factual basis for the plea; (xii) and other general remarks required under Boykin, Mackey and Rule 11 of the Tennessee Rules of Criminal Procedure.

As can be gleaned from examination of the court record submitted with this petition, there is no evidence that the trial court had an actual colloquy in open court with the defendant. The record reflects that the defendant signed a petition for a suspended sentence. As the court in Chamberlain notes, "the written documents did not relieve the trial judge from addressing the appellate in open court as required," by law. Chamberlain, 815 S.W.2d at 539. Like the petitioner in Chamberlain, we assert that the documents from the guilty plea proceedings do not affirmatively, "disclose that the [Petitioner] voluntarily and understandingly entered his plea of guilty," as mandated by Boykin, Mackey, and Rule 11 of the Tennessee Rules of Criminal Procedure. Chamberlain, 815 S.W.2d at 540, *quoting* Boykin 395 U.S. at 24489 S.Ct. 1713, 23 L. Ed. at 280.

When the record is wholly insufficient to establish that the plea was knowing and voluntary, the burden shifts to the state to show by clear and convincing evidence that th1 Petitioner voluntarily, understandingly and knowingly entered his plea. Chamberlain, 815 S.W.2d at 541; *see also*, Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir. 1975).

CONCLUSION

This Petitioner respectfully submits that this Court should grant him post-conviction relief by finding that the judgment and sentence from May. 1976 are illegal. Or, in the alternative, by finding that his conviction from May 1976 is void because the plea was not voluntary, knowing and/or intelligent in light of the incomplete record.

WHEREFORE PREMISES CONSIDERED, Petitioner prays:

1. That this Court set an immediate hearing to determine the issues raised herein;

2. That this Court find that his judgment and sentence from May 1976 are illegal;

3. Or in the alternative, that this Court find that the Petitioner's conviction from May 1976 is void in that he

did not voluntarily, understandingly, and knowingly enter a plea to a felony;

4. For other such relief that the Petitioner is entitled.

Respectfully submitted,

DAVIS & WALLACE, PC

/s/ Lee Davis
Lee Davis, BPR #15958
Bryan H. Hoss, BPR #021529
508 E. 5th Street
Chattanooga, Tennessee 37403
423-266-0605
423-266-0687 Fax

CERTIFCATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this motion has been served upon the following by placing same in the United States mail with sufficient postage thereon to carry same to its destination:

Lila Statom
Boyd Patterson
Assistant District Attorney
600 Market Street
Chattanooga, Tennessee 37402

On this the 6 day of April, 2004.

/s/ Lee Davis
LEE DAVIS

NO. 130199 **GJ NO. P 39-266**

A TRUE BILL

CHARGE: FELONIOUSLY SELLING A CONTROLLED SUBSTANCE

****

STATE OF TENNESSEE

VS.

TERRY PENNY

GARY D. GERBITZ
DISTRICT ATTORNEY GENERAL

/s/ Donald W. Hyden
GRAND JURY FOREMAN

EXHIBIT
A

****

CLERK'S SUMMONS for the STATE

✓ CAPT. PAT ROWE,
CHATANOOGA POLICE

JOYCE GADD, % JOE MCCULLOUGH,
CHATTANOOGA POLICE DEPARTMENT

BETH WILSON, % JOE MCCULLOUGH,
CHATTANOOGA POLICE DEPARTMENT

✓ DET. JOE MCCULLOUGH,
CHATTANOOGA POLICE DEPARTMENT

WAYNE MCMAHON, MILNE AVE

GEORGE BRADLEY, % JOE MCCULLOUGH,
CHATTANOOGA POLICE

TERRY GRIZZARD,
CHATTANOOGA POLICE DEPARTMENT

/s/ Donald W. Hyden ..... FOREMAN

/s/ Charles J. Haley

/s/ Rebecca J. Jones

/s/ Damon Lewis

/s/ Dorothy P. Haggard

/s/ Andrew T. Powers

/s/ Clara Shelley

/s/ King Mason

/s/ Cynthia North

/s/ Andrew Baker

/s/ Cleve Armstrong

/s/ Sam Love

/s/ Katherine Henderson

2,500 ..... BOND

FILED

STATE OF TENNESSEE, HAMILTON COUNTY

130199 Criminal Court April Term, 1975

THE GRAND JURORS for the State aforesaid, being duly summoned, elected, impaneled, sworn and charged to inquire for the body of the County aforesaid, upon their oaths present:

That Terry Penny heretofore on the 6th day of February, 1975, in the County aforesaid, did unlawfully and feloniously sell or deliver a controlled substance, to-wit: Ethchlorvynol (Schedule IV), against the peace and dignity of the State.

_____

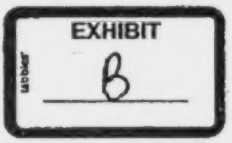
District Attorney General

THE FOLLOWING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE THIS 3-5-04 GWEN TIDWELL Criminal Court Clerk DC

FILED IN OFFICE
1975 APR -1 PM 4:05 BY
CLYDE M. SANDERS, CLERK
BY_____ D.C.
FILM REF:_____

COPY JUDGMENT - CONVICTION, WORKHOUSE
(WAIVER OF TRIAL BY JURY)

STATE OF TENNESSEE
County of Hamilton



Pleas at a Criminal Court begun and held at the Court House in the City of Chattanooga County and State aforesaid, on the First Monday of MAY, 1976, the same being the 3rd day of said month.

Present and presiding, the Honorable CAMPBELL CARDEN, Judge of the FIRST Division of the Criminal Court of the Sixth Judicial Circuit of Tennessee, duly elected, commissioned and qualified when the following proceedings were had, to-wit:–

Chattanooga, Tennessee, May 19, 1976.

Court met pursuant to adjournment, present and presiding the Honorable CAMPBELL CARDEN, Judge, etc., when the following proceedings were had, to-wit:–

Case No. 130199

THE STATE Charge FEL. SELLING CONT.

vs. SUBSTANCE

TERRY PENNY Came the Attorney-General and

_____ the Defendant in person, with his

_____ attorney, Mr. BUCK DIETZEN,

and this case came on for trial on defendant's plea of ___ guilty before the court without a jury, the defendant having waived his right to a trial by jury.

Upon defendant's plea, upon proof hear and arguments of counsel, it is therefore adjudged by the Court that defendant is guilty of ATTEMPT TO COMMIT A FELONY

and it is the judgment of the Court that defendant be ____ confined in the Penal Farm of Hamilton County for a term of 11 months 29 days

and pay or secure all costs. Execution will issue against defendant.

Defendant is to be allowed credit for time in jail as indicated below:

5/19/76 EXECUTION OF JUDGMENT WITHHELD

6/28/76 JUDGMENT ORDERED INTO EXECUTION - PET. FOR SUSPENDED SENTENCE SUSTAINED ON PAYMENT OF COSTS ON OR BEFORE 7/30/76 AND GOOD BEHAVIOR FOR 5 YEARS UNDER PAROLE SUPERVISION.

Date of Arrest: 5/12/76
Date made Bond: 5/12/76
****
Date of Arrest: _____
Date made Bond: _____
****
Date of Arrest: _____
Date made Bond: _____
Also credit from and after:

_____

STATE OF TENNESSEE

Criminal Court of Hamilton County

I, CLYDE M. SANDERS, Clerk of said Court, do hereby certify that the above and foregoing one page contains a full, true and correct copy of the judgment of Court rendered in the above case, on the day stated, as the same appears of record in my office.

Given under my hand and seal of said Court, at office in Chattanooga, Tennessee, this 28th day of JUNE, 1976.

Fine	$	
Traffic Vio. Penaly	$	xxxxx
Court Costs	$	347.25
State and County Tax	$	24.00
Attorney General's Fee	$	10.00
Jail Fees	$	6.00
State and County Expense Fee	$	
		387.25

CLYDE M. SANDERS
Clerk of the Criminal Court of Hamilton County
By:/s/ Clifford A. Dalton
Deputy Clerk

STATE OF TENNESSEE COUNTY OF HAMILTON,
CRIMINAL COURT, SIXTH JUDICIAL CIRCUIT.

To the Superintendent of the Penal Farm of Hamilton County, Tenn.:

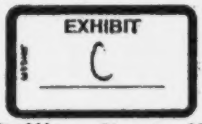
Upon the foregoing certified copy of the Judgment and Sentence of the FIRST Division of the said Criminal Court of the Sixth Judicial Circuit of Tennessee, you are hereby commanded to receive the said defendant, TERRY PENNY, into your custody, and detain him in the said Penal Farm of Hamilton County, Tennessee, until he be legally discharged.

CLYDE M. SANDERS
Clerk of the Criminal Court
Sixth Judicial Circuit of Tennessee
By: /s/ Clifford A. Dalton
Deputy Clerk

MICROFILM
REF. NO. 1342

STATE OF TENNESSEE
Hamilton County Criminal Court, Division No. 1
Minutes May Term May 19 1976

Court met pursuant to adjournment, present and presiding the Honorable Campbell Carden, Judge, etc., when the following proceedings were had, to-wit:



130199 State v. Terry Penny - Fel. Selling Controlled Substance

Came the Attorney General and the defendant in person with his attorney, Mr. Buck Dietzen, and this case came on for hearing before the Court without a jury on defendant's plea of guilty.

Upon defendant's plea and upon proof heard, it is adjudged by the Court that the defendant is guilty of Selling A Controlled Substance, Schedule IV, and it is the judgment of the Court that the defendant serve a term of 11 months and 29 days at the Hamilton County Penal Farm, and pay all costs. Execution will issue against the defendant for the costs.

Execution of the judgment is further ordered withheld pending an investigation by the State Parole Office, Defendant is allowed 10 days within which to file a

Petition for Suspended Sentence to be heard on June 28, 1976. No bond allowed.

130200 State v. Benny Ray Suttles - Fel. Receiving and/or Concealing Stolen Property

131984 State v. Benny Ray Suttles - Forgery Of Endorsement

Came the Attorney General and the defendant in person with his attorney, Mr. Rheubin Taylor, and these cases came on for hearing before the Court without a jury, the defendant having waived his right tot a trial by jury under the provision of Section 40-2504, Tennessee Code Annotated.

Upon defendant's pleas and upon proof heard, it is adjudged by the Court that the defendant is guilty of Attempting To Commit A Felony in each case, and it is the judgment of the Court that the defendant be confined in the State Penitentiary for a term of not less than 1 nor more than 1 year, and pay all costs. Execution will issues against the defendant for the costs.

Thereupon, Court adjourned pending further business of the Court.

/s/ Campbell Carden
Campbell Carden, Judg

THE FOREGOING INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL NOW ON FILE IN MY OFFICE.

Date MAR 24 2004

GWEN TIDWELL, Criminal Court Clerk

By _____ DC

STATE OF TENNESSEE
Hamilton County Criminal Court, Division No. 1
Minutes May Term June 28 1976

Court met pursuant to adjournment, present and presiding the Honorable Campbell Carden, Judge, etc., when the following proceedings were had, to-wit:

132997 State v. Leonard J. Helms, Jr. - Fel. Selling Controlled Substance

Came the Attorney General and the defendant in person with his attorney, Mr. Leroy Phillips, and the Court ordered this case set for trial on September 16, 1976.

133033 State v. Charles Lawrence - Fel. Selling Controlled Substance

133004 State v. Charles Lawrence - Fel. Selling Controlled Substance

133005 State v. Charles Lawrence - Fel. Selling Controlled Substance

133006 State v. Charles Lawrence - Fel. Selling Controlled Substance

133007 State v. Charles Lawrence - Fel. Selling Controlled Substance

Came the Attorney General and the defendant in person with his attorney, Mr. John Senters, and the Court ordered this case set for trial on July 9, 1976.

133018 State v. - Fel. Selling Controlled Substance

133028 State v. Tony Phillips - Fel. Selling Controlled Substance

133090 State v. William Brazelton - Larceny and/or Shoplifting

133059 State v. Thornton Lee Handley - Murder

133062 State v. Vernon Robert Harris - Assault With Intent To Carnally Know Female Under Twelve

131927 State v. Tom Cole and

131928 Harole Hoke - Fel. Vio. TCA 39-301

131929 State v. Tom Cole and

131930 Harole Hoke - Fel. Vio. TCA 39-301

The above cases are hereby ordered continued to July 12, 1976, for reassignment.

133087 State v. Larry O. Taylor and

133088 Charles H. Watt, Jr. - Larceny From Person

For good and sufficient reasons appearing to the Court, the defendant herein were surrendered by their bondsman to the Court and...

132841 Samuel Ray Neal v. State - Post-Conviction Petition

Hearing on the above case is hereby ordered set on September 13, 1976, along with a Motion To Dismiss, upon oral motion of Mr. David Nelson.

132745 State v. David O'Rear and

132746 Frank Merritt - Armed Robbery

Hearing on a Motion To Continue is hereby ordered continued to June 29, 1976.

130199 State v. Terry Penny - Fel. Selling Controlled Substance

The above case came on for hearing on a Petition For Suspended Sentence heretofore filed by Mr. Buck Dietzen, and the Court, after hearing said petition, is of the opinion same is a proper case for the suspension of the entire sentence.

Said petition is, therefore, sustained and the sentence hereby suspended upon payment of the costs on or

before July 9, 1976, and further conditioned upon the defendant's good behavior for a period of 5 years, under the supervision of the State Parole Office.

131984 State v. Benny Ray Suttles - Forgery of Endorsement

131982 State v. Benny Ray Suttles - Fel. Receiving and/or Concealing Stolen Property

The above case came on for hearing on a Petition For Suspended Sentence heretofore filed by Mr. Rheubin Taylor, and the Court, after hearing said petition, is of the opinion same is not a proper case for the suspension of the sentence, and it is, therefore, denied and the judgment heretofore taken in the above case is hereby ordered into execution and the defendant is allowed credit for the time served in jail awaiting trial of this cause.

130239 State v. Eddie Dyer - Fel. Selling Controlled Substance

130261 State v. Eddie Dyer - Fel. Selling Controlled Substance

130259 State v. Eddie Dyer - Fel. Selling Controlled Substance

The above cases came on for hearing on a Petition To Revoke Suspended Sentence heretofore filed by the State on June 7, 1976, and the Court, after hearing said petition, is of the opinion same is well taken, and it is, therefore, sustained and the judgments heretofore taken in these cases are hereby ordered into execution.

Defendant is further allowed to serve each of the above sentences at the Hamilton County Penal Farm.

And further allowed credit for the time spent in jail awaiting hearing of this cause.

131921 State v. Clifford Farris - Armed Robbery

Hearing on a Petition For Suspended Sentence is hereby ordered continued to July 12, 1976.

127968 - 9

_____ State v. Lois Rose = Pet. Revoke

ORDER OF APPOINTMENT OF LEGAL COUNSEL
FOR INDIGENT DEFENDANT

The defendant, Lois Rose, having been called to plead to the indictment(s) or presentment(s) found against him, wherein he is charged with Pet. Revoke Suspended Sentence and it appearing to the undersigned Judge

presiding, from affirmations made by the defendant and after due inquiry made, as appears in the record that the defendant is unable by reason of his indigency to employ the services of counsel to represent him in this cause; it is,

ORDERED AND ADJUDGED that the defendant is an indigent and in need of the services of an attorney, as contemplated by law; and that CHARLES WRIGHT, Attorney at Law, duly licensed to practice in the State of Tennessee is hereby appointed as counsel for the indigent defendant as is provided by law.

This the 28th day of June, 1976.

/s/ Campbell Carden
Judge

Thereupon, Court adjourned pending further business of the Court.

/s/ Campbell Carden
Campbell Carden, Judge

THE FOREGOING INSTRUMENT IS A
TRUE AND CORRECT COPY OF THE
ORIGINAL NOW ON FILE IN MY OFFICE.

Date MAR 24 2004

GWEN TIDWELL, Criminal Court Clerk

By _____ DC

STATE OF TENNESSEE	*	**NO. 130199**
	*	**IN THE CRIMINAL**
VS.	*	**COURT FOR**
	*	**HAMILTON COUNTY,**
TERRY EUGENE PENNEY	*	**TENNESSEE**
	*	**DIVISION I**

PETITION FOR PROBATION

Comes the petitioner, Terry E. Penney, and shows to the Court as follows:

I.

That on the 19th day of May, 1976, the petitioner entered a plea of guilty of possession of marijuana, a misdemeanor, and was sentenced to the workhouse for a period of Eleven (11) months Twenty-Nine (29) days. The case was passed for an investigation by the probation officers.

II.

Petitioner further shows to the Court that he was convicted for possession of marijuana at Clarksville, Tennessee in Montgomery County and was sentenced to Eleven (II) Months Twenty-Nine (29) days in the workhouse and was fined Four Hundred ($400.00) Dollars. He began serving his time in the workhouse at Clarksville

on September 19, 1975. He will have served his full time on the 18th day of June, 1976. Some two months .ago, petitioner was allowed to come to Chattanooga and dispose of the case before the Court.

III.

The petitioner is married and has one child, a son. He graduated from Soddy-Daisy High School and was awarded a football scholarship at Austin Peay College where he played tackle for a period of two years. Since the petitioner came over to Chattanooga, he has been confined in the Hamilton County Workhouse and has made a model prisoner both here and in-Montgomery County Tennessee.

IV.

Prior to his conviction in Clarksville Tennessee, he was employed with Brock Candy Company and liked his job. The petitioner believes that he can return to the Brock Candy Company, if his sentence is suspended. A copy of a letter from the Director of Personnel is hereto attached as Exhibit A of said petition.

V.

Petitioner realizes the seriousness of this charge and, if granted a parole from said sentence, he will be forever a law abiding citizen.

VI.

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That the sentence imposed upon him be suspended and he be placed on probation conditioned upon his continued good behavior.

2. Grant general relief.

DIETZEN, DIETZEN & BARKER

BY W. N. Dietzen
Attorneys for Petitioner
615 Walnut Street
Chattanooga, Tennessee 37402

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon the opposing party, or counsel for all parties at interest in this case by delivering a true and exact copy of said pleading to

the offices of said counsel or by placing a true and exact copy of said pleading in the United States Mail addressed to the opposing party or to said counsel at office, with sufficient postage thereupon to carry the same to is destination.

This the 16 day of June, 1976.

By /s/ W. N. Dietzen

STATE OF TENNESSEE
COUNTY OF HAMILTON

Terry E. Penney makes oath in due form of law that the allegations contained in the foregoing petition are true.

This the 16th day of June, 1976.

/s/ Terry E. Penney
TERRY E. PENNEY

Sworn to and Subscribed before me this 16th day of June, 1976.

/s/ W. N. Dietzen
NOTARY PUBLIC

My Commission Expires:
11-18-78

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA THE ELEVENTH JUDICIAL CIRCUIT

STATE OF TENNESSEE	*	
Plaintiff,	*	
	*	
vs.	*	**CASE NO. 130199**
	*	
TERRY PENNY	*	
Defendant	*	

EXHIBIT
E

I, Abigail M. Pearce, Official Court Reporter for Division I of Hamilton County Criminal Court, do hereby certify that I have listened to the official audiotapes for court proceedings held on May 19, 1976, and June 28, 1976, before Judge Campbell Carden, and have found that there was no recording made relating to the above-styled case on either date.

/s/ Abigail M. Pearce
Abigail M. Pearce
Official Court Reporter
Hamilton County Criminal Court
Division I

Sworn to and subscribed before me this 29 day of March, 2004.

/s/ Melanie Clark Cabin
Notary Public
My Commission Expires:

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	*	**NO. 130199**
	*	
vs.	*	**DIVISION I**
	*	
TERRY E. PENNEY,	*	
	*	
DEFENDANT.	*	

FILED
Apr. 5, 2004
County Court,
Tennessee, Clerk

AFFIDAVIT OF TERRY E. PENNEY

STATE OF TENNESSEE)
COUNTY OF HAMILTON)

Terry E. Penney, being first duly sworn in accordance with law; deposes and says:

1. My name is Terry Eugene Penney. I am the Petitioner in this Petition for Post Conviction.

2. I am a resident of Hamilton County, Tennessee. My date of birth is August 3, 1949.

3. On April 1, 1975, when I was 25 years old, I was named as a defendant in an indictment for feloniously selling a Schedule IV controlled substance in Hamilton County, Tennessee, Docket Number 130199.

4. On May 11, 1976, I pled guilty to a misdemeanor and received a sentence of 11 months and 29 days.

5. On June 16, 1976, under oath and in due form of law, I signed and had notarized a "Petition for Probation" wherein I asked for a suspended sentence for my misdemeanor plea of possession of marijuana

6. This Court granted my Petition and suspended the sentence of 11 months and 29 days.

7. The trial court judge never conducted a discussion with me regarding the nature of my plea, nor did the Court have any discussion with my attorney: From my recollection, I appeared in Court. The petition was made and I was granted a suspended sentence. I remember the Judge asking me if I wanted to plead guilty to misdemeanor possession and I said that I did.

8. I understood that I was in Court, that I was pleading to a misdemeanor and that I would receive 11 months and 29 days, suspended on my good behavior. To the best of my knowledge, I was never on probation, supervision or parole supervision.

9. The District Attorney General, the Court, nor my defense attorney never stated or discussed a factual

basis for the plea with me. I was never asked about my understanding of the entry of the guilty plea or advised whether the guilty plea would have any effect on me for future proceedings.

10. My constitutional rights were never explained to me. I was never advised that I would be giving up certain constitutional rights if I pled guilty.

11. I was never advised at any point during the proceedings that my misdemeanor plea could later be construed as a felony or be used by the Federal government as the basis for prosecution against me. Had that been explained to me I would not have entered my misdemeanor plea of guilty.

FURTHER AFFIANT SAITH NOT.

/s/ Terry Penney
TERRY EUGENE PENNEY

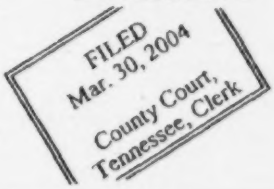
Sworn to and subscribed before me
This 5th day of April, 2004.

/s/ Jen Shahan
NOTARY PUBLIC

My Commission Expires: May 2007

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	*	**NO. 130199**
	*	
vs.	*	**DIVISION I**
	*	
TERRY E. PENNEY,	*	
	*	
DEFENDANT.	*	



MOTION TO CORRECT JUDGMENT

COMES NOW, the Defendant, Terry E. Penney, pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure and moves this Honorable Court to correct his judgment.

Rule 36 provides that "clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the Court orders."

As grounds thereto the Defendant would show the following:

1. On April 1, 1975 the Defendant was indicted for feloniously selling a schedule IV controlled

substance. A copy of that indictment is attached hereto as Exhibit "A."

2. On May 19, 1976, the Defendant pled guilty and received a sentence of 11 months and 29 days. The execution of judgment was withheld on that date. A copy of the judgment is attached hereto as Exhibit "B." The judgment reflects that the Defendant pled guilty to Attempt to Commit a felony. The courtroom minutes from that date reflect that the Defendant pled guilty to Selling a Controlled Substance. A certified copy of the courtroom minutes is attached as Exhibit "C."

3. On May 19, 1976, the Defendant, through counsel, filed a Petition for a Suspended Sentence and stated under oath that he pled guilt to simple possession of marijuana, a misdemeanor. A copy of the Petition is attached hereto as Exhibit "D."

4. On June 28, 1976, the Court granted the Defendant's Motion for a Suspended Sentence.

5. Respectfully, the Defendant moves this Court for an order to correct the judgment to reflect that he pled guilty to selling a controlled substance, received a sentence of 11 months 29 days suspended on his good behavior, a misdemeanor offense.

WHEREFORE PREMISES CONSIDERED,

Movant requests:

A. That this Court correct the judgment;

B. Any further and general relief to which the Defendant is entitled.

Respectfully submitted,

DAVIS & WALLACE, P.C.

/s/ Lee Davis
Lee Davis, BPR #15958
Bryan Hoss, BPR #021529
508 E. 5th Street
Chattanooga, TN 37403
(423) 266-0605
(423) 266-0687 Fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this motion has been served upon Rodney Strong, Assistant District Attorney, 600 Market Street, Chattanooga, Tennessee 37402, and Boyd Patterson, Assistant District Attorney, 600 Market Street, Chattanooga, TN 37402, by placing same in the United States mail with sufficient postage thereon to carry same to its destination on this the 30 day of March, 2004.

/s/ Lee Davis
Lee Davis